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Nos. 1016-1017

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., ET AL.

v.

UNITED STATES OF AMERICA

CALIFORNIA ALKALI EXPORT ASSOCIATION, ET AL.

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the District Court (R. 73) has not yet been reported.

JURISDICTION

The order of the District Court sought to be reviewed was entered on January 11, 1945 (R. 76–77). The motions for leave to file petitions for writ of certiorari have been filed in this Court by

United States Alkali Export Association, Inc., et al., and by California Alkali Export Association, et al. The jurisdiction of this Court is invoked under Section 262 of the Judicial Code (28 U. S. C., sec. 377).

QUESTION PRESENTED

The Government believes that the ruling for which review is sought is correct. It will not, however, discuss this question but will deal only with the question whether the circumstances of this case are such as to make it appropriate to issue the requested writs of certiorari or to grant leave to file petitions for such writs. The issue presented in this connection is:

> Whether the question sought to be reviewed is of such public importance as to warrant departure from the usual rule that a writ under Section 262 of the Judicial Code will not be granted to review an interlocutory ruling which is reviewable on appeal from final judgment when Congress has, as to the particular type of proceeding, authorized appeals only from final judgments.

STATUTES INVOLVED

Section 262 of the Judicial Code (28 U. S. C., sec. 377) provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be neces-

> sary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 2 of the Expediting Act of February 11, 1903, as amended (15 U. S. C. sec. 29), provides in part:

> In every suit in equity brought in any district court of the United States under any of said Acts,[1] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court * * *.

STATEMENT

This is a civil suit under Section 4 of the Sherman Act brought against two incorporated export trade associations, 13 domestic corporations manufacturing alkalis (all members of one or the other of the two defendant associations), and a British corporation manufacturing alkalis in Great Britain and a domestic subsidiary thereof, charging these defendants and certain named co-conspirators with being parties to a conspiracy in restraint of interstate and foreign commerce in alkalis, in violation of Section 1 of the Sherman Act. The complaint sets forth that each of the two defendant associations had filed a written statement with the Federal Trade Commission, as authorized by

[1] The "said Acts" referred to are the Sherman Act, the Interstate Commerce Act, and any other act having a "like purpose." See *Columbia Gas & Elec. Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 381.

Section 5 of the Act of April 19, 1918 (15 U. S. C., sec. 61), known as the Webb-Pomerene Act, for the purpose of claiming on behalf of itself and its members the immunities conferred by Sections 2 and 3 of that Act (R. 12–13, 14–15).

The complaint is a comprehensive one and includes the charges (1) that the parties agreed to assign certain areas as the exclusive market territory of particular concerns or groups of concerns or to assign quotas to them in such areas, thus eliminating competition in foreign trade; (2) that the parties agreed that those who manufactured alkalis in other countries should not export their products to the United States; (3) that competition by exporters from the United States, not parties to the conspiracy, was systematically suppressed by the parties; and (4) that export quotas of producers of alkalis in the United States were manipulated by parties to the conspiracy for the purpose of maintaining prices in the domestic market. (R. 16–41.)

The defendants other than the British corporation and its domestic subsidiary filed a motion praying for dismissal of the complaint (R. 69, 72). The ground of the motion was that under Sections 2 and 5 of the Webb-Pomerene Act exclusive jurisdiction of the matters charged in the complaint is vested, in the first instance, in the Federal Trade Commission and that the District Court was therefore without jurisdiction. The District Court denied the motion. (R. 76-77) and

petitioners now seek to have this Court issue writs of certiorari to review this interlocutory ruling.

Petitioners do not question the correctness of the District Court's holding that the complaint sets forth a conspiracy not given immunity from the prohibitions of the Sherman Act by Section 2 of the Webb-Pomerene Act, for the reason that the immunity conferred is subject to certain limiting conditions to which the petitioners did not, under the allegations of the complaint, conform. The sole contention which is made is that notwithstanding the violation of the Sherman Act which stands admitted in the present state of the pleadings, under Section 5 of the Webb-Pomerene Act there can be no civil or criminal proceeding based on such violation until after the Federal Trade Commission has investigated the matter and reported its conclusions to the Attorney General.

ARGUMENT

The question raised by petitioners' motions is whether the case is an appropriate one for the exercise by this Court of power to issue a writ of certiorari under Section 262.

In nearly all the cases in which the Court has issued writs of certiorari under Section 262 the writ has issued to circuit courts of appeals. These cases had either come before the circuit courts of appeals under the usual appellate procedure or by reason of requests to those courts for the issu-

ance of writs under Section 262. Grant of certiorari by this Court did not involve—as it would in the present case—use of the writ to review an interlocutory ruling in circumvention of the appellate procedure established by Congress.

While we believe that the principles governing issuance of certiorari in the present case are to be found in this Court's discussion of issuance of writs of mandamus under Section 262 (see *infra*, pp. 8–10), we summarize immediately below the circumstances under which this Court has issued certiorari under that Section.

Certiorari has thus issued (1) where a right of appeal to the appropriate circuit court of appeals had been denied;[2] (2) to review a circuit court of appeals judgment reversing and remanding district court judgments, where writ of error to this Court would not lie, in order to avoid "further protracting the litigation";[3] (3) where a circuit court of appeals had denied a temporary injunction against collection of state taxes and petitioner alleged an unconstitutional taking of property and that it was without adequate remedy under State law;[4] (4) to review the action of circuit courts of appeals with respect to the issuance of writs under Section 262 itself;[5] and (5) to review orders of a

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[2] *In re 620 Church Street Corp.*, 299 U. S. 24; *Holiday* v. *Johnston*, 313 U. S. 342; *Stefflер* v. *United States*, 319 U. S. 38; *House* v. *Mayo*, No. 921, this Term, decided February 5, 1945.

[3] *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117.

[4] *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 2[illegible]

[5] *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268.

Federal trial court prohibiting the petitioner from prosecuting writs of error to this Court from decisions of a state court and adjudging him in contempt for violation of such orders.[6]

One of the cited cases, *Whitney* v. *Dick*, 202 U. S. 132, warrants brief comment. In that case the circuit court of appeals had issued a writ of certiorari under Section 262 to reverse a judgment of conviction upon the ground that the district court was without jurisdiction. This Court reversed the circuit court of appeals, holding that since the jurisdictional question could be raised by writ of error, grant of certiorari was erroneous. The Court said (p. 140): "There must be 'circumstances imperatively demanding' a departure from the ordinary remedy by writ of error or appeal." It also said (*ibid.*) that the reasons prompting the improper issuance of certiorari in the case were similar to those frequently prompting writs of habeas corpus, namely, "to put an end to the litigation by some short summary process" rather than to proceed in "the orderly way" by writ of error, and that the Court had "repeatedly held against this procedure."

The present proceeding is one in which Congress has authorized appeals only from final judgment.[7]

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[6] *In re Chetwood*, 165 U. S. 443. The Court said (p. 462): "Judgments in proceedings in contempt are not reviewable here on appeal or error [citing cases]; but they may be reached by certiorari in the absence of any other remedy."

[7] See Section 2 of the Expediting Act, *supra*, p. 3.

The question of the District Court's jurisdiction which petitioners seek to bring before this Court is one which they can have reviewed on such an appeal, if one is later prosecuted.

In *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, this Court fully reviewed the considerations governing issuance of a special writ under Section 262 to review an interlocutory ruling in a proceeding in which the appellate procedure established by Congress authorizes review only of final judgments. In that case the circuit court of appeals had issued a writ of mandamus to a district court to require it to set aside a ruling holding invalid certain pleas in abatement to an indictment. This Court reversed, holding that the granting of the writ was an abuse of discretion. The Court, after pointing out (pp. 29–30) that circuit courts of appeals have, with immaterial exceptions, been given jurisdiction to review only final decisions of district courts, said (p. 30):

> Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.[8]

[8] That the doctrine enunciated is not limited to criminal cases is made clear by the Court's citation, immediately following the above quotation, of decisions applying the same doctrine in civil cases.

The Court also said (p. 26) that while the traditional use of the writ of mandamus had been to confine an inferior court to its prescribed jurisdiction or to compel it to exercise its authority when under a duty to do so, appellate courts are reluctant even in such cases to grant the writ as to questions "which are reviewable in the regular course of appeal," and the Court referred (p. 31) to its numerous decisions holding that mandamus will not issue to review an order overruling a plea to the jurisdiction.

As to the special considerations justifying the issuance of writs of mandamus, the Court (pp. 31–32) cited the following as examples: a persistent disregard of the Rules of Civil Procedure; refusal of a court to perform a plain ministerial duty; involvement of comity between state and Federal courts; and an erroneous assumption of jurisdiction interfering with the petitioner's right to a jury trial.

Mandamus will issue to review an interlocutory ruling if prompt determination of the question whether the lower court is improperly exercising its jurisdiction is of sufficient "public importance." *Ex Parte Peru*, 318 U. S. 578. In a proceeding *in rem* against a vessel owned by the Republic of Peru the district court had denied a claim of sovereign immunity. Since the State Department's certification of the vessel's immunity constituted

a determination by the political arm of the Government, conclusive on the courts, that continued retention of the vessel "interferes with the proper conduct of our foreign relations," this Court felt that giving prompt effect to the action of the political branch of the Government was of "such public importance and exceptional character as to call for the exercise of our discretion to issue the writ" (318 U. S. 586–587).

The Government does not believe that immediate determination of the District Court's jurisdiction in the present case is of similar importance. Petitioners' suggestion (Pet. U. S. Alkali Export Assn. 9) that the question, while it remains unresolved, will lead to prolonged proceedings simultaneously in Federal courts and before the Federal Trade Commission in this and other cases is unsound. The Webb-Pomerene Act has been in force for more than 25 years and the question here presented has now arisen under that Act for the first time. Petitioners' further suggestion (*ibid.*) that postponement of final determination of the question will impair plans for a revival of post-war international trade is equally unsound. The mooted question is purely procedural and does not relate to the scope of the prohibitions of the substantive law.

If this Court should grant the requested writs and should consider the question whether investi-

gation and report by the Federal Trade Commission are a condition precedent to any proceeding under the Sherman Act against activities carried on by export associations registered under the Webb-Pomerene Act, it would be necessary to decide whether judicial consideration of the allegations of the complaint is barred wholly or only in part and whether it is barred as against only the defendant export trade associations or as against all defendants who are members of such an association. Such questions can be much better determined, we believe, after trial of the issues has disclosed the full facts than on the bare allegations of the complaint.

If the proposed petitions for certiorari were within the purview of Section 240 of the Judicial Code and therefore involved no departure from the procedure established by Congress to govern appellate review, the Government would not oppose grant of certiorari; for the question of the relative functions of the Federal Trade Commission and the district courts under the Webb-Pomerene Act is a significant one, even if not, in our view, one of great doubt. Our present objection goes simply to the undesirability of establishing a precedent for bringing before this Court, without any compelling reason therefor, an intermediate ruling in an antitrust proceeding.

CONCLUSION

For the reasons stated, it is respectfully submitted that the motions for leave to file petitions for writs of certiorari should be denied.

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